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Nos. 01-653, 01-657

FILED
JUN 21 2002
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In the Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION, *Petitioner*,
v.
NEXTWAVE PERSONAL COMMUNICATIONS INC., *et al.*,
Respondents.

ARCTIC SLOPE REGIONAL CORP., *et al.*, *Petitioners*,
v.
NEXTWAVE PERSONAL COMMUNICATIONS INC., *et al.*,
Respondents.

On Writs of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

BRIEF *AMICUS CURIAE* OF AIRADIGM COMMUNICATIONS, INC. IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE[1]

Airadigm Communications, Inc., is a "very small business" under the FCC's rules, 47 C.F.R. § 24.720(b)(2), that operates PCS systems in Wisconsin and Iowa, using entrepreneurs' block licenses it won at auction. After investing millions of dollars to build its network, Airadigm now provides service to more than 30,000 subscribers, most of them in rural areas and many on tribal lands. Even after filing a petition in bankruptcy, Airadigm has continued to serve the public and fulfill the statutory goal of deploying "new technologies, products, and services for the benefit of the public, including those residing in rural areas." 47 U.S.C. § 309(j)(3)(A).

Like Respondents NextWave Personal Communications, Inc. and NextWave Power Partners, Inc. (collectively, "NextWave"), Airadigm temporarily ceased making debt payments to the FCC and to its other creditors while it was in bankruptcy. Airadigm has a strong interest in, and a unique and valuable perspective on, this case because, despite Airadigm's build-out and service to more than 30,000 subscribers, the FCC has taken the position that Airadigm's PCS licenses, like NextWave's, are subject to automatic cancellation. Moreover, reference to Airadigm's particular experience may aid the Court's consideration of this case, for Airadigm is precisely the innovative entrepreneur that Congress required the FCC to promote—such that the FCC's attempt to cancel Airadigm's licenses dramatizes the wrongfulness of the automatic cancellation policy.

More particularly, Airadigm is a joint venture between a subsidiary of the Oneida Nation (a tribe of Native Americans with lands in rural Wisconsin) and Wisconsin Wireless Communications, Inc., itself a very small business. In the FCC's C and F Block auctions, Airadigm won 15 PCS

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[1] This brief was authored entirely by counsel for Amicus Curiae Airadigm Communications, Inc. No person or entity other than Airadigm made a monetary contribution to its preparation.

licenses covering most of Wisconsin and part of northeastern Iowa.[2] The overwhelming majority of this service territory is rural.

Airadigm bid a total of about $71.5 million for the licenses. It timely made its down payments, and after that made three installment payments. To date, it has paid approximately $13 million to the FCC. Immediately upon receiving its licenses, moreover, Airadigm began implementing an ambitious service plan. It was the first non-pioneer's preference licensee to begin offering service in the C Block, and has now built out an all-digital PCS network covering much of its licensed population.[3]

Believing that it could turn a profit by serving underserved markets, Airadigm concentrated on providing service where it was needed most. The first cell sites that Airadigm activated were on the Oneida reservation, where none had been before. Airadigm now provides digital coverage throughout all of the Oneida tribal lands. More generally, Airadigm has at great cost sought to provide service to less-populated rural areas that traditionally have been underserved. Initially, Airadigm also concentrated much of its effort on an innovative landline replacement business model, bringing competition not only to wireless but also to traditional landline operators. Numerous small businesses and institutions now use Airadigm's wireless service as a partial or total replacement for traditional wireline telephony.

Airadigm's ambitious business plan required a massive investment in network equipment, however, and when subscriber revenues fell short of predictions it ran into

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[2] *See* Public Notice, "Entrepreneurs' C Block Auction Closes," DA 96-716 (May 8, 1996).

[3] *See Requests for Extension of the Commission's Initial Non-Delinquency Period*, Order, 13 F.C.C.R. 22071 (1998) (statement of Commissioners Harold Furchtgott-Roth and Gloria Tristani, dissenting in part).

financial difficulties. Thus, in July 1999, suffering heavy losses from operations, Airadigm sought "a breathing spell from [its] creditors," and a chance to "reorganize" its management team and business plan, H.R. Rep. No. 95-595, at 340 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6296-97 (purpose of 11 U.S.C. § 362(a)), and filed for protection under chapter 11 of the Bankruptcy Code.

After filing its chapter 11 petition, Airadigm secured additional debtor-in-possession financing and working capital loans. At the behest of the secured creditors, a "turn-around" specialist was hired, who reorganized or replaced much of Airadigm's management, trimmed its operating costs, increased its revenues, and re-focused its business model. The business turn-around seemed essentially complete in October 2000, when Airadigm confirmed a plan of reorganization that allowed Airadigm to emerge from bankruptcy with the help of two strategic investors, and to go forward (it hoped) as a viable business.[4]

However, a cloud has remained over Airadigm's affairs. In January 2000, two weeks after the FCC announced that NextWave's license had "automatically cancelled" and would be reauctioned,[5] the FCC informed Airadigm that it would take the position that Airadigm's licenses, too, had automatically cancelled. This pronouncement struck Airadigm like lightning from a clear sky. Although the FCC had filed a proof of claim and actively participated in Airadigm's bankruptcy, where Airadigm gained court authorization to pay its various current obligations, the FCC had never claimed that the quarterly interest payments on its own pre-petition debt should be among those obligations. And it never took any

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[4] *In re Airadigm Communicators, Inc.*, Order Confirming Collective Plan of Reorganization for Airadigm Communications, Inc. as of Friday, October 13, 2000, No. 99-33500 (Bankr. W.D. Wis., Nov. 15, 2000).

[5] Public Notice, "Auction of C and F Block Broadband PCS License," DA 00-49 (Jan. 12, 2000).

action in the bankruptcy case, or in its own regulatory processes, to challenge Airadigm's open and continuing operations.

While reserving its rights to litigate, Airadigm in February 2000 petitioned the FCC for regulatory relief. The Communications Act and the FCC's own well-established policies dictate that the FCC should grant such relief as is necessary to preserve uninterrupted service to the public.[6] Airadigm asked the FCC to waive its automatic cancellation rules, or, if Airadigm's licenses had already cancelled, to reinstate them *nunc pro tunc*, to avoid cutting off service to tens of thousands of subscribers, including small businesses, governmental units, hospitals and other institutions, many of whom were in otherwise underserved rural areas and tribal lands.

The FCC has yet to act on Airadigm's petition. FCC officials are apparently paralyzed by the tenuousness of their litigation position against NextWave: One FCC official was quoted as stating candidly that his agency's "big fear" was that "an Airadigm decision could somewhat undermine our position in the NextWave case."[7] Thus, even though Airadigm developed and rapidly deployed "new technologies, products and services" particularly in "rural areas," made "efficient and intensive use" of its spectrum "without administrative or judicial delay," and introduced an "innovative" landline replacement service that provides "competition" to other wireless operators and the incumbent wireline carriers, *see* 47 U.S.C. § 309(j)(3), Airadigm's right to continue to operate the network it built hangs in limbo, pending this Court's consideration of the FCC's attempt to immunize itself from the plain and universal application of the Bankruptcy Code.

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[6] *See, e.g., Second Thursday Corp.*, 22 F.C.C.2d 515, 515-16 (1990); *Liberty Cable Co.*, 11 F.C.C.R. 14133 (1996).

[7] Mary Greczyn, *Bankrupt Airadigm Awaits FCC Decision on C-Block Licenses*, Communications Daily, Vol. 21, No. 32 (Feb. 15, 2001).

SUMMARY OF ARGUMENT

To circumvent the plain mandate of the Bankruptcy Code, the government posits a conflict between that statute and the Communications Act. But there is no conflict. NextWave demonstrates in its brief that the unambiguous command of the Bankruptcy Code precludes the FCC's purported license cancellation. Airadigm demonstrates below that the Communications Act says nothing to the contrary.

The policy that the government seeks to enforce here—automatic cancellation of a debtor's licenses for its failure in bankruptcy timely to make a quarterly installment payment—is by no stretch required by the Communications Act. At best, that policy is a creature of regulation: a byproduct of the FCC's interpretation of its own rules implementing the Act. That fact alone disposes of the FCC's manufactured conflict-of-laws argument. The FCC cannot by rule except its operations from the express command of another federal statute.

Moreover, the government's policy is directly at odds with important provisions and purposes of the Communications Act that it purports to serve. Although section 309(j) authorizes the use of auctions, it does not permit the FCC to abdicate to the free market the decision of which allocation, among competing applicants, would best serve the public interest. On the contrary, Congress steered the FCC away from strict market-based allocations, directing the FCC instead to promote through its regulations a host of enumerated policy objectives. Among those are a preference for "new technologies," concern for residents of "rural areas," a desire to promote "economic opportunity" and the dissemination of licenses among a "wide variety of applicants," and particular solicitude for "small businesses, rural telephone companies, and businesses owned by members of minority groups and women." 47 U.S.C. § 309(j)(3).

The government's narrow focus on the "integrity of the auction process" as a pure, market-based allocative

mechanism, and on automatic cancellation as a means of preventing "insincere" bidding, ignores and conflicts with these other stated ends of the Communications Act. By preventing an orderly reorganization under chapter 11, the automatic cancellation policy would work to the particular disadvantage of the inherently risky "small" and "innovative" operations that the Act requires the FCC to promote.

Nor is an automatic cancellation rule necessary to the narrow policy ends that the government proclaims. Nothing but the government's *ipse dixit* supports its insistence that a temporary suspension of installment payments at any time during the decade-long course of those payments will compromise the "integrity of the auction process." Indeed the FCC itself has recognized that bankruptcy and private workouts may be more efficient than and preferable to reclaiming and reauctioning licenses. Moreover there is no need to strain the law to protect the integrity of spectrum auctions: the bankruptcy process and the FCC's own rules contain ample safeguards against the sort of "gaming" that the FCC claims to fear. And if those are not enough, the FCC could have adopted other safeguards that do not run afoul of the Bankruptcy Code.

The facts and circumstances of Airadigm's case provide a real-life illustration of the absurdity of the FCC's purported policy rationale, for it is difficult to see what the FCC would gain by seizing and reauctioning Airadigm's licenses. It would terminate service to more than 30,000 mostly rural Americans, reduce competition, and destroy a small, rural telephone company owned in part by a minority group. For no good reason. Airadigm did not "game" the auction process, but went bankrupt because it forecasted wrong: about the cost of its innovative new technology, and how much people would be willing to pay for it. Finally, should the Court conclude that the FCC may cancel licenses for the untimely payment during bankruptcy of installment debt, Airadigm would also urge this Court to avoid any

intimation that might foreclose the FCC's ability to waive its cancellation policy in appropriate circumstances.

ARGUMENT

The government correctly states that, "where possible, one federal statute should not be interpreted in a manner that obstructs the functioning of another." FCC Br. 19; *see also* ASRC Br. 39. But that canon provides the government no support in this case. On the contrary, that principle compels affirmance. As the D.C. Circuit held, and as NextWave demonstrates conclusively, the text of Section 525 of the Bankruptcy Code unambiguously prohibits the FCC from canceling licenses solely because of the licensee's failure to make installment payments in bankruptcy. The FCC urges this Court to read the "policies" of the Communications Act to override the Bankruptcy Code and require "automatic cancellation" of PCS licenses whenever a bankrupt licensee fails to make a timely quarterly interest payment, in order to enforce discipline on a "market-based" allocation mechanism. As we demonstrate below, however, no provision of the Communications Act remotely *requires* that result, and the FCC's regulatory policy, even if otherwise valid, could not overcome the express mandate of the Bankruptcy Code. *See, e.g., FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000) (refusing to uphold agency interpretation that would interrupt statutory scheme). Moreover, the FCC's automatic cancellation policy is, in fact, at odds with the Communications Act it purportedly serves, ignoring relevant text and frustrating the achievement of core purposes of the Act.

I. THE COMMUNICATIONS ACT DOES NOT REQUIRE THE AUTOMATIC CANCELLATION OF LICENSES FOR UNTIMELY INSTALLMENT PAYMENTS IN BANKRUPTCY

The government argues that the Communications Act's specific "rules for license allocation" should take precedence

over any contrary mandate of the Bankruptcy Code. FCC Br. 20; *see also* ASRC Br. 39-44.[8] This argument suggests that the Communications Act requires the remedy of automatic cancellation of auctioned PCS licenses whenever a licensee operating under the protection of chapter 11 fails timely to make a quarterly installment payment to the FCC.[9] But the text of the Act leaves no doubt that this remedy for late payment is merely the FCC's interpretation of an FCC rule, not a requirement of the Communications Act. That is fatal to the government's case, for an otherwise valid agency rule is impermissible where Congress has provided to the contrary in another statute. *Brown & Williamson*, 529 U.S. at 137-38. Even if the policies that the FCC seeks to implement are otherwise valid and "important," it cannot "subordinate[]" to its interpretation of the Communications Act the "competing considerations underlying a Chapter 11 reorganization." *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 525 (1984). Because the Communications Act in no way *requires* cancellation, the FCC cannot interpret its way out of the Bankruptcy Code's

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[8] The government repeatedly—and incorrectly—attributes to the Act and to Congress the FCC's strict market allocation policies, stating variously that "Congress established a market-based system," FCC Br. 14, that "Congress adopted auctions ... because those entities that will use spectrum most productively will generally also be willing to pay the most for it," FCC Br. 19, that the D.C. Circuit decision would turn auctions "into the very sort of speculative venture that Congress sought to avoid," FCC Br. 26-27, and *passim*. Likewise the Auction #35 Petitioners erroneously spot a "blatant conflict" between the Bankruptcy Code and Communications Act, ASRC Br. 42, and incorrectly claim, for example, that Congress "placed [its] faith in market forces," ASRC Br. 40. Contrary to these characterizations, Congress did not adopt the market-based system that petitioners contend. *See* 16-18, below. Moreover, until the Act was amended in 1997 (after the C-Block auction is at issue here), the Act permitted, but did not require, the FCC to hold auctions. Pub. L. No. 105-33, § 3002(a), 111 Stat. 251, 258 (1997).

[9] The first eight quarterly installment payments are interest only; the remaining 32 are principal and interest. *See* 47 C.F.R. § 1.2110(g)(3).

command that it not "revoke...a license" for non-payment in bankruptcy of accrued interest on a pre-petition debt. *See* 11 U.S.C. § 525(a).

The government stakes its contrary argument principally on Section 309(j). This provision permitted the FCC to resolve mutually exclusive license applications through "competitive bidding." But amidst all of the specificity of Section 309(j), which dictates the circumstances in which competitive bidding may be used and the means by which the FCC's auction authority may be exercised, *see* (12)—(15), *infra*, no provision requires or authorizes automatic cancellation for untimely installment payments.

The government protests that the timely payment requirement and automatic cancellation somehow emanate from the general penumbra of auction authority conveyed in Section 309(j). *See generally* FCC Br. 22-25 (theorizing that timely payment is "critical" to "the integrity of the auction process"); *see also* ASRC Br. 41. But the government fails to identify even penumbral support for the notion that allocation by auction *requires* a resort to automatic cancellation of licenses for untimely payment in bankruptcy.

Indeed, the text of Section 309(j) could as easily support the opposite interpretation: that distressed licensees should be afforded an "automatic hiatus" of payments.[10] In fact, the FCC interpreted Section 309(i) to allow such an "automatic

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[10] The FCC is authorized to "consider alternative payment schedules," 47 U.S.C. § 309(j)(4)(A), which could easily include various forms of relief to bankrupt or distressed licensees. And the explicit authorization of "royalty payments, or other schedules or methods," *id.*, implies by the principle of *ejusdem generis* that such "schedules or methods" might, like royalty payments, link the requirement of payments to the licensee's revenues and ability to pay. Such relief would be consistent with the ends the FCC is required to promote—for example avoiding the "administrative...delays" necessarily entailed in repossession and reauction, "promoting economic opportunity," and other of the Act's enumerated objectives. *See* 47 U.S.C. § 309(j)(3); *see also infra* at 14-15.

hiatus" of installments when it suspended all C-Block payment obligations for a seventeen-month period in 1997 and 1998.[11] It cannot now seriously contend that the same provision *prohibits* a payment hiatus and instead *requires* automatic cancellation for untimely payment.

The government also repeatedly incants the FCC's "exclusive authority" over licensing, FCC Br. 26, but this too is unavailing. *See also* ASRC Br. 39-40. Whatever licensing authority the FCC has is, to be sure, exclusive. But this exclusivity does not immunize the FCC's actions from the operation of other statutes of general application, such as the Administrative Procedure Act and the Bankruptcy Code. Indeed, dozens of federal agencies have exclusive authority over their respective bailiwicks, yet they too must take their lumps in bankruptcy. *See generally, e.g., Bildisco*, 465 U.S. 513 (collective bargaining agreement rejected in bankruptcy, notwithstanding NLRB attempt to preserve it). The FCC's exclusive licensing authority does not authorize (much less require) it to cancel bankrupt debtors' licenses for untimely installment payments in violation of Section 525 of the Code.

Finally, the government points to the general savings provision of Section 309(j)(6)(C), which provides that nothing in "this subsection"—Section 309(j)—or "in the use of competitive bidding" shall "diminish the authority of the Commission under the other provisions of this Act to regulate or reclaim spectrum licenses." *E.g.*, FCC Br. 47-48. Yet by its terms that provision saves only the FCC's authority to "regulate or reclaim" licenses in accordance

[11] *Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Servs. (PCS) Licensees*, Order on Reconsideration of the Second Report and Order, WT Dkt. No. 97-82, at ¶¶ 3-4 (Mar. 24, 1998) (hereinafter, "*Order on Reconsideration*") (payment suspension period beginning March 31, 1997 and ending March 31, 1998); *see also, e.g.*, Public Notice, "U.S. Department of Justice Approves Debt Forgiveness," DA 98-1051 (June 3, 1998) (approving debt forgiveness aspects of *Order on Reconsideration*).

with "other provisions" of the Act *outside* Section 309(j) insofar as those "other provisions" might be diminished by exercise of the authority provided *inside* Section 309(j). 47 U.S.C. § 309(j)(6). Nothing in this savings clause empowers the FCC *inside* Section 309(j) to "reclaim" licenses where no provision *outside* Section 309(j) and the auction scheme provided therein would otherwise give rise to license reclamation. The savings clause of Section 309(j)(6)(C) itself conveys no affirmative authority, much less any authorization to cancel or "reclaim" licenses in circumstances where that is forbidden by the Bankruptcy Code. *See also, e.g., United States v. Locke*, 529 U.S. 89, 105 (2000) ("evident purpose" of savings clause is to preserve existing law, "rather than impose substantive regulation").

In light of the unambiguous mandate of Section 525 of the Bankruptcy Code, the absence from the Communications Act of any express *requirement* that licenses automatically cancel for nonpayment in bankruptcy is fatal to the government's case. Even if the Communications Act could otherwise be interpreted to allow the FCC to promulgate and enforce a substantive rule of automatic cancellation, the contrary command of the Bankruptcy Code would block that path. A regulation that "operates to create a rule out of harmony with the statute, is a mere nullity." *United States v. Larionoff*, 431 U.S. 864, 873 n.12 (1977) (citation omitted); *see also, e.g., Bildisco*, 465 U.S. at 529 n.9 (agency interpretation constrained by Bankruptcy Code). The government stands the principle of statutory harmonization on its head when it insists that the unambiguous dictates of the Bankruptcy Code should give way to the FCC's regulatory efforts to enforce the "integrity" of auctions as strict, market-based allocation mechanisms.

II. AUTOMATIC CANCELLATION OF LICENSES FOR UNTIMELY PAYMENT FINDS LITTLE SUPPORT IN THE PROVISIONS AND PURPOSES OF THE COMMUNICATIONS ACT.

Even if the FCC could somehow leverage a valid regulatory interpretation of the Communications Act to avoid the plain application of the Bankruptcy Code, there is little support in the Communications Act for the automatic cancellation of PCS licenses for late payments in bankruptcy. The government is on shaky ground contending that the Communications Act permits use of auctions as strict, market-based allocation mechanisms. Indeed, the Act's allocative policies are directly at odds with the FCC's policy that PCS licenses are automatically revoked whenever a bankrupt licensee fails for any reason to make a payment on time. Having ignored crucial provisions of the Act in its single-minded pursuit of market-based allocations, the FCC cannot now look to the Communications Act to shield its actions from the Bankruptcy Code.

A. Automatic Cancellation Conflicts With The Purposes Of The Communications Act.

Although Section 309(j) of the Communications Act authorizes the FCC to allocate licenses by competitive bidding, it tightly restricts the circumstances under which competitive bidding may be used, *e.g.*, 47 U.S.C. §§ 309(j)(2), 765f, and the means by which the auction authority may be exercised. Most saliently, using "the language of command," *Alabama v. Bozemon*, 533 U.S. 146, 153 (2001) (citation omitted), Congress specified that the FCC "shall seek to promote" certain enumerated policy objectives. 47 U.S.C. § 309(j)(3). Among other things, these objectives state a preference for "new technologies," concern for residents of "rural areas," a desire to promote "economic opportunity" and the dissemination of licenses among a "wide variety of applicants," and particular solicitude for "small businesses, rural telephone companies, and businesses owned by

members of minority groups and women." 47 U.S.C. § 309(j)(3).

Likewise in "prescribing regulations" to carry out these objectives, Congress did not allow the FCC merely to trust market forces to optimize the manner and level of service provided or to achieve the enumerated policy objectives. The Communications Act directs that the FCC "shall" include "performance requirements" to benefit "rural areas" and prevent spectrum "stockpiling." 47 U.S.C. § 309(j)(4)(B). The licensing scheme must promote a geographically "equitable distribution" of licenses even where the market might produce an inequitable (though perhaps economically efficient) result. 47 U.S.C. § 309(j)(4)(C). And while free transferability will tend to assign assets to their highest value use, the FCC must constrain the market with "antitrafficking" and other rules necessary to "prevent unjust enrichment." 47 U.S.C. § 309(j)(4)(E). Thus, the statute trusts market-based allocations only up to a point, and requires the FCC in some circumstances to allocate licenses where the market might not.

At the same time, the FCC is directed to recover for the public fisc "a *portion* of the value" of the spectrum, 47 U.S.C. § 309(j)(3)(C) (emphasis added), but not necessarily its full value. If Congress had intended, as the government suggests, to allocate licenses to those "willing to pay the most" for them, FCC Br. 19, it might have avoided such surplussage. The statute thus treats the sale of spectrum licenses with some suspicion, de-emphasizing the importance of payments, as such, in the allocative scheme.

Further, although the market might allocate licenses overwhelmingly to large incumbents, the Act provides that the FCC must "ensure" that small businesses "are given the opportunity" to provide wireless services. 47 U.S.C. § 309(j)(4)(D). Whereas the market might produce a natural monopoly, the FCC must "promot[e]...competition" and "disseminat[e] licenses among a wide variety of applicants." 47 U.S.C. § 309(j)(3)(B). And while the highest and best use

might be to "warehouse" or "stockpile" spectrum for future technologies or spectrum requirements, the FCC is required to "prevent" those ends. 47 U.S.C. § 309(j)(4)(B).

In sum, the detailed specifications of Section 309(j) hardly reflect a "'classical belief in the efficacy [of] market forces.'" FCC Br. 23 (quoting Pet. App. 229(a) (alteration in original)). Far from leaving the FCC free simply to rely on Adam Smith's "invisible hand" to allocate licenses, the Act requires the FCC to intervene in the market—to manage who receives a public spectrum license and the use to which it is put. The government seriously oversimplifies and misconstrues the terms of its competitive bidding mandate when it seeks to enshrine "an entity's willingness and ability to pay the most for the license" as the sole or "paramount" indicia of the "public interest," *see* FCC Br. 15, 25; *see also* ASRC Br. 40, and on that basis to argue that the proper "functioning" of the Communications Act requires automatic cancellation for untimely payment.

In fact the opposite is true. The FCC's authorization to "consider alternative payment schedules," including "installment payments," specifies that any such method must "promote the objectives described in paragraph (3)(B)." 47 U.S.C. § 309(j)(4)(A). As noted, those objectives include "promoting economic opportunity and competition and ensuring that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women." 47 U.S.C. § 309(j)(3)(B). Automatic cancellation of licenses for untimely payment is directly at odds with those objectives. By canceling Airadigm's licenses, for example, this policy would reduce "competition," deny 30,000 Americans access to the "new and innovative technolog[y]" they have chosen to purchase, and at once destroy a "small business[]," a "rural telephone compan[y]," and a business "owned by [a] minority group[]" of Native Americans. *See* 47 U.S.C.

§ 309(j)(3)(B). The penalty of automatic cancellation thus tramples core policies specified by the Communications Act.

These results, moreover, are entirely foreseeable. Small, thinly capitalized businesses like Airadigm will always lack the financial cushion enjoyed by large incumbent operators such as Petitioner and re-auction winner VoiceStream Wireless; they will always be one step closer to insolvency, bankruptcy, and untimely payments. Likewise, innovative and untested ventures (such as Airadigm's landline replacement strategy) will always carry more risk than more traditional business models; they will always be more prone to untimely payments.

Moreover, the FCC's policy of automatic cancellation for untimely payment by Chapter 11 debtors, if announced and known at the time of the auction, would have tended by its mere presence to harm small businesses and to discourage innovation. Investors, particularly commercial lenders, would have refused to back any but the most stable and well-established concerns, for they would lose any hope of recovery if the business turned sour. Indeed the FCC has long recognized such "'equitable considerations in favor of innocent creditors'" in its *Second Thursday* doctrine, which allows a licensee facing revocation instead to sell its license, so long as the proceeds flow primarily to its creditors.[12] Automatic cancellation for untimely payment in bankruptcy would dramatically increase the risk and consequences of small-business failure and thereby raise the cost of capital to licensees, channeling investment instead towards less innovative, less entrepreneurial, and therefore less risky business models.

There is thus little support in the Communications Act for automatic cancellation of spectrum licenses for untimely payment in bankruptcy. By its terms, and particularly as

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[12] *See. e.g., MobileMedia Corp.*, Memorandum Opinion and Order, 14 F.C.C.R. 8017, at ¶ 4 (1999) (quoting *Second Thursday Corp.*, 22 F.C.C.2d 515, at ¶ 5 (1970)).

illustrated by its application to small and innovative businesses such as Airadigm, that policy would not "promote" but would instead harm the objectives set forth in Section 309(j)(3)(B).

B. The FCC's Paramount Focus On Strict Market-Based Allocation Is A Path Rejected By Congress.

As early as 1986, the FCC asked Congress for authority to auction licenses, rather than use comparative hearings or lotteries.[13] The FCC complained that the comparative hearing process "can go on and on for years" and consume "millions of dollars in litigation fees to get the service out."[14] Even at the conclusion of that "very long and very tedious" process, the fine and often pointless distinctions among applicants left the FCC "not at all sure that they have chosen the best licensee at the end of the day."[15] The FCC also expressed dissatisfaction with the lottery process, which, in its view, spawned a "lottery frenzy" with thousands of applications churned out by "application mills," leaving the FCC to the "laborious task" of processing those

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[13] *See, e.g., Spectrum Auctions: FCC Proposals for the Airwaves: Hearing before the Subcomm. on Telecom., Consumer Protection, and Finance of the House Comm. on Energy and Commerce*, 99th Cong. 1 (1986) (hereinafter, "*Spectrum Auctions*") (statement of Subcomm. Chairman Wirth discussing spectrum auction proposal).

[14] *Departments of Commerce, Justice, State, the Judiciary, and Related Agencies Appropriations for Fiscal Year 1988: Hearings before a Subcomm. of the Senate Comm. on Appropriations on H.R. 2763*, 100th Cong. 14 (1987) (hereinafter, "*H.R. 2763 Hearing*") (testimony of Mark Fowler, Chairman of the FCC).

[15] *FCC Reauthorization: Hearing before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transp.*, 102d Cong. 21 (1991) (testimony of Hon. Alfred Sikes, Chairman of the FCC); *see also H.R. 2763 Hearing*, 100th Cong. 26 (written response of Mark Fowler, Chairman of the FCC to questions submitted by Senator Hollings) (it is "unclear whether [comparative hearings] provide the type of information that enables the Commission to choose the applicants that will best serve the public").

thousands of applications, determining their threshold qualifications, and choosing among them.[16] And even then, the FCC noted, license lotteries often led to litigation and "literally years of administrative delay."[17]

Yet Congress nonetheless balked at granting the FCC auction authority. Indeed, legislation was introduced to expressly ban the use of auctions to allocate spectrum licenses.[18] In explaining his opposition to an earlier auction proposal, Telecommunications Subcommittee Chairman Wirth said, "[t]he public will not be served by allowing only larger, wealthier companies to obtain communications licenses at the expense of smaller companies, including minority-owned businesses...."[19] Likewise, although a proposed "Auction Licensing Act of 1987" was projected to yield a $600 million windfall for the budget,[20] it was rejected by Congress and sparked a tongue-lashing of Chairman Fowler by Senator Rudman: "Congress isn't going to go along with your auction," he stated, because "it will aid monopolies. You won't get anywhere with this, so why don't you go back to the drawing board?"[21]

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[16] *FCC Reauthorization: Hearing before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transp.*, 102d Cong. 21 (1991) (testimony of Hon. Alfred Sikes, Chairman of the FCC).

[17] *Emerging Telecommunications Technologies: Hearings before the Subcomm. on Telecomm. and Finance of the House Comm. on Energy and Commerce on H.R. 2965*, 101st Cong. 28 (1990) (hereinafter, "*H.R. 2965 Hearing*") (statement of Alfred Sikes, Chairman of the FCC).

[18] *See, e.g., H.R. 2965 Hearing*, 101st Cong. 3 (statement of Hon. Don Ritter discussing auction ban in H.R. 2965).

[19] *Spectrum Auctions*, 99th Cong. 2 (statement of Subcomm. Chairman Wirth).

[20] *H.R. 2763 Hearing*, 100th Cong. 5 (statement of Mark Fowler, Chairman of the FCC)

[21] *H.R. 2763 Hearing*, 100th Cong. 14.

It was not until the budget act for fiscal year 1993 that Congress granted auction authority to the FCC. But even then, this was not the free-market deregulatory authority that the FCC had requested. Opponents of pure, market-driven auctions had argued strenuously that competitive bidding would "violate the notion that the airwaves are owned by the public and should be regulated for its benefit...instead of selling spectrum rights to the rich."[22] The Conference Report thus recognized the "concern[] that, unless the Commission is sensitive to the need to maintain opportunities for small businesses, competitive bidding could result in a significant increase in concentration in the telecommunications industries."[23] Ultimately Congress forged a compromise.[24] In the 1993 Budget Act Congress authorized auctions to recover a "portion" of the spectrum value, while requiring the FCC affirmatively to protect against market forces the various interests Congress found important.

There is little support in the legislative history, moreover, for the government's contention that Congress authorized auctions with a view that market-based competitive bidding had special allocative significance. That line of reasoning is largely a *post hoc* invention. Rather, the structure, text and history of Section 309(j) indicate that Congress authorized the use of auctions principally to raise money for the treasury. The legislation was entitled the "Omnibus *Budget* Reconciliation Act of 1993," Pub. L. No. 103-66, 107 Stat. 312 (1993) (emphasis added), and the rest of the statute makes plain that it was, in general, intended to provide additional funding to reconcile the budget. For example, in this Act, Congress for the first time began charging user fees at certain National Parks, Pub. L. No.

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[22] 139 Cong. Rec. 2348 (1993) (statement of Sen. Inouye).

[23] H.R. Rep. No. 103-111, at 254 (1993), *reprinted in* 1993 U.S.C.C.A.N. 378, 581.

[24] *See H.R. 2763 Hearing*, 100th Cong. 15.

103-66, § 10001, 107 Stat. at 402, and levied a ten cent per hundred weight fee on imported tea, *id.* § 4401, 107 Stat. at 378. *See, e.g., Kokoszka v. Belford*, 417 U.S. 642, 650 (1974) (clause interpreted "in connection with...the whole statute...and the objects and policy of the law, as indicated by its various provisions") (citation omitted). Like beverage duties and park user fees, the 1993 Act authorized spectrum auctions as a source of federal revenue, but required the FCC at the same time to ensure that licenses were allocated in the public interest.

In sum, automatic cancellation cannot be defended as a concomitant of Congressional intent to adopt a deregulatory system that relies purely on market forces to allocate licenses.[25] Congress considered and refused to follow precisely that approach. "Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987) (citation omitted).

C. Automatic Cancellation Is Unnecessary To Promote Allocative Efficiency.

Even if (contrary to its plain terms) the Communications Act left the FCC free to abdicate its licensing authority to the "invisible hand," and thus to use its auction authority to award licenses solely to whoever could pay the most for them, automatic cancellation for untimely payment of periodic interest in bankruptcy cannot be defended as necessary to allocative efficiency.

1. Installment Payments Lack The Significance Of Down Payments.

The government repeatedly quotes the D.C. Circuit's conclusion in another case that the FCC's payment rules "'provide an "early warning" that a winning bidder unable to

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[25] "[T]he wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute." *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 194 (1978).

comply with the payment deadlines may be financially unable to meet its obligation to provide service to the public.'" FCC Br. 25 (quoting *Mountain Solutions, Ltd. v. FCC*, 197 F.3d 512, 518 (D.C. Cir. 1999)).[26] But by its terms that conclusion related only to the five percent *down payment* that was at issue in *Mountain Solutions*, not to the subsequent quarterly installment payments at issue here. The FCC had emphasized in *Mountain Solutions* that the second down payment was "the last payment that is required before the Commission grants the license and proceeds with installment payments under a note and a security agreement. It is important that financial viability be clearly demonstrated before we grant the license because the Commission runs the risk of bankruptcy tying up the license."[27] The strict down payment requirement was viewed as a means to "discourag[e] insincere or financially unqualified bidders from 'shopping' a winning bid in order to obtain financing for a down payment."[28] Thus, the FCC had determined that by failing to make its down payment "Mountain Solutions has failed to demonstrate its financial viability," and its fitness as a licensee.[29] The D.C. Circuit found that while the FCC might have concluded otherwise, the agency did not "abuse[] its discretion." *Mountain Solutions*, 197 F.3d at 521-22.

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[26] Likewise the government cites to the FCC's decisions in *Southern Communications Sys., Inc.*, Order, 12 F.C.C.R. 1532 (WTB 1997), and *Longstreet Communications Int'l, Inc.*, Order, 12 F.C.C.R. 1549 (WTB 1997), both of which, like *Mountain Solutions*, dealt with down payments, not installment payments. FCC Br. 25.

[27] *Mountain Solutions Ltd.*, Memorandum Opinion and Order, 13 F.C.C.R. 21983, at ¶¶ 18 (1998). Plainly, if licenses could be "tied up" in bankruptcy the FCC in 1998 had not yet taken the view that nonpayment in bankruptcy would lead to automatic cancellation.

[28] *Longstreet Communications Int'l, Inc.*, Order, 12 F.C.C.R. 1549, at ¶ 6 (WTB 1997).

[29] *Mountain Solutions*, 13 F.C.C.R. 21983, at ¶¶ 14-17.

Unlike the missed down payment at issue in *Mountain Solutions*, untimely installment payments do not necessarily provide an "early warning" of a licensee's financial viability. Indeed, installment payments stretch out for *ten years*—the entire term of the license. *See* 47 C.F.R. §§ 1.2110(g)(3)(ii), 24.15. For example, Airadigm did not file for bankruptcy and cease making installment payments until three years after it submitted its winning bids, almost a third of the way through its full license term. Airadigm's missed installment payments cast no doubt on its "capability to actually build out its system." *Mountain Solutions*, 13 F.C.C.R. 21983, at ¶ 18. Airadigm built out a top-quality, all-digital PCS system nearly five years ago, and it now provides service to more than 30,000 subscribers. Even after Airadigm filed for bankruptcy protection and began missing payments it continued and completed portions of its buildout, improving and expanding its service to the public. In hindsight, Airadigm's plan to rapidly deploy new and innovative services may have been *too* ambitious, for it ultimately led to unsustainable losses from operations. But while Airadigm's creditors and equity holders paid the price for their ambition and landed in bankruptcy, still the public has enjoyed the benefits of Airadigm's wireless system, and has continued to enjoy those benefits throughout Airadigm's bankruptcy.

2. Timely Payment Lacks The Significance Of Full Payment.

The FCC's basic policy argument is that a bidder in one of its auctions might be tempted to "insincere" bidding if it knows *ex ante* that it can escape its obligations, should it come to regret its bid. *E.g.*, FCC Br. 24. Such a regime, the government says, would permit speculators to bid more than their expected value for the spectrum on the chance that its value might increase, and would thus impair the ability of the auction to allocate licenses to their highest-value users. *Id.*

As an initial matter, this reasoning is too facile—particularly in its assumptions that bidders have perfect

foreknowledge and that there exists some Platonic truth as to who is the highest value user. In fact, bidders make a series of educated guesses as to how much it will cost to build and operate a system, what their future cost of capital will be, how many subscribers they will attract and retain, and how much revenue each subscriber will generate, and then wrap those guesses together into an overall guess as to how much they can afford to pay for the spectrum. And like Airadigm's, some of those guesses may prove wrong.

Likewise, the "value" of the spectrum will always include its potential value to another user. A bidder may rationally value a license according to the net present value of the income stream to be generated by its own use of that license. Or it might just as rationally value the license according to the price another user would pay for the license—a price in turn dictated by the income stream the license represents to that other user. So a bidder must predict not only the income stream it might generate, but also the income stream some other user might generate and thereby the potential value of its own exit strategy. Against this backdrop of uncertainty, it is unreasonable to brand as "insincere" and punish with cancellation those whose predictions later proved flawed.

More fundamentally, the FCC's allocative efficiency argument only goes to a situation where the bidder may escape "'the obligation to make good *the amount* bid.'" FCC Br. 24 (quoting Pet. App. 246a) (emphasis altered). According to the FCC's theory, it is necessary to hold bidders to their bid amounts in order to discourage speculation. It may be one thing to argue that *full* payment of the amount bid is necessary to preserve the "integrity of the auction process." But that issue is not before this Court. *E.g.*, FCC Br. (I). Airadigm has never challenged the amount due to the FCC, and both Airadigm and NextWave have repeatedly sought to make full payment to the FCC. Nowhere in the government's brief or anywhere else—*including in the original rulemaking proceeding or the regulatory Order from which this appeal stems*—is there

any explanation of how the FCC's argument extends to the *time* an installment payment is made.

A bidder's recognition at the time of the auction that it could take the "breathing spell" provided by chapter 11 of the Bankruptcy Code, and thereby delay some of its quarterly payments for a limited period of time (the average chapter 11 bankruptcy takes 13 months),[30] would likely have no effect on its valuation of the licenses or on the amount of its bid. Certainly the ability to delay payments under chapter 11 does not create the "put option" that the government describes as "heads-I-win, tails-you-lose." FCC Br. 26. Particularly given the haircut normally taken by equity holders and frequent wholesale replacement of senior management in bankruptcy, there is little reason to suppose that the availability of a payment hiatus would encourage "insincere" bidding or otherwise affect the amount of any bid.

In light of the time value of money, one *could* argue that the ability to delay payments is of value, and that to permit such delay would effectively reduce the amount of the winning bid. Yet the FCC has never made this argument, in its briefs or in its own regulatory proceedings. And in any case the quantum of any such time value would be tiny—perhaps one third of one percent of the bid amount—and immaterial to the value of the license.[31] There is simply no evidence that anticipation of the potential for bankruptcy

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[30] Margaret Graham Tebo, *A New Chapter*, 87 A.B.A.J. 46 (July 2001).

[31] Because the installment payments delayed by NextWave and Airadigm were interest-only, the time value of these would in effect be the interest on the interest, deferred over the course of an average year-long bankruptcy. *See* Tebo, *A New Chapter*, 87 A.B.A.J. 46 (average bankruptcy 13 months in length). Thus, the first missed quarterly payment would be deferred for a year, while the last missed quarterly payment would be deferred only for a quarter. At a 7.5 percent nominal rate for the FCC debt, this would produce a time value of the deferred payments equal to approximately one third of one percent of the debt amount.

relief from the timely payment requirement would have any impact on bidding strategy.

Any notion that payment delay in this sense is equivalent to payment reduction is belied by the FCC's own C-Block Restructuring Order. In March 1997, in response to several petitions from distressed C-Block licensees, the FCC decreed a temporary suspension of all installment payments.[32] This hiatus apparently did not undermine the "integrity of the auction process." On the contrary, the FCC drew a clear distinction between payment deferral, which did not "result in a reduction of the current nominal debt owed," on the one hand, and debt "forgiveness" on the other.[33] While it implemented a seventeen-month payment deferral, it refused to provide debt "forgiveness."[34] Thus, the FCC itself recognized the important difference between payment *delay* and payment *reduction* in its C-Block restructuring orders.

D. Automatic Cancellation Would Not Advance The Communications Act's Goal Of Minimizing Transaction Costs.

Automatic cancellation for untimely payment in bankruptcy is not necessary to effectuate Congress's goal of rapid deployment of services "'without administrative or judicial delays.'" *See* FCC Br. 25, 49 (quoting 47 U.S.C. § 309(j)(3)(A)); *see also* ASRC Br. 41-42. To the contrary, because this bright-line rule is profoundly overinclusive, it would cause many more administrative and judicial delays than it would remedy. The FCC itself has recognized that "reclaiming and reauctioning licenses" can "engender"

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[32] *Installment Payments for PCS Licenses*, Order, 12 F.C.C.R. 17325 (WTB 1997).

[33] *Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Servs. (PCS) Licensees*, Second Report and Order and Further Notice of Proposed Rulemaking, 12 F.C.C.R. 16436, at ¶¶ 18-19 (1997).

[34] *Id.*

unfortunate side effects, including "investor and/or service disruption[s]."[35] For example, the FCC's automatic cancellation policy has seriously undermined Airadigm's ability to continue building out its licensed areas, as it has prevented Airadigm from fully consummating its Plan and receiving the influx of capital provided thereby.[36] Moreover, the FCC has recognized the particular capabilities of auctions conducted under bankruptcy court supervision—stating that an applicant's "high bid" in one such bankruptcy auction ensures that the "transaction will shift these assets toward their highest valued use."[37] Thus, a disposition in bankruptcy accomplishes the same allocative goal that the FCC's rules claim to pursue. Automatic cancellation and reauction would often prove less efficient, and cause more delay, than reorganization under chapter 11.

E. Protections Less Draconian Than Automatic Cancellation Are Sufficient To Ensure The Integrity Of Auctions.

Even if the FCC needed to guard against bidders who might somehow game the auction process by using the temporary "breathing spell" provided by chapter 11, automatic cancellation for untimely payments in bankruptcy is akin to killing a gnat with a shotgun. License cancellation is a "death penalty" for FCC licensees that "should not be considered or undertaken lightly."[38] Carriers must invest

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[35] *Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap*, Report and Order, 11 F.C.C.R. 7824, at ¶ 85 (1996).

[36] *Cf. In re Airadigm Communicators, Inc.*, Order Confirming Collective Plan of Reorganization for Airadigm Communications, Inc. as of Friday, October 13, 2000, No. 99-33500 (Bankr. W.D. Wis., Nov. 15, 2000).

[37] *Geotek Communications, Inc., Debtor-In-Possession*, Memorandum Opinion and Order, 15 F.C.C.R. 790, at ¶ 44 (WTB 2000).

[38] *Petition for Declaratory Ruling Concerning the Requirement of Good Faith Negotiations*, Memorandum Opinion and Order, PR Dkt. No. 93-144, at ¶ 5 (WTB rel. Mar. 2, 2001).

vast amounts of money to build a network and a business. For example, Airadigm's capital expenditures and net investment in operations are more than triple the amount of its FCC debt.[39] Yet that entire investment becomes essentially worthless without the FCC license upon which it all depends. Mechanisms short of the cancellation "death penalty" are sufficient to dissuade licensees from gaming the auction.

Foremost among these mechanisms are those provided by bankruptcy law itself. At the outset, a chapter 11 filing may be subject to dismissal if made under the circumstances the FCC fears: Section 1112(b), which allows dismissal or conversion under various circumstances, including the absence of a "reasonable likelihood of rehabilitation," 11 U.S.C. § 1112(b), provides "a powerful tool to weed out inappropriate chapter 11 cases at the earliest possible stage." 7 *Collier on Bankruptcy* ¶ 1112.04[2] (Alan N. Resnick et al. eds., 15th ed. rev. 2002). In addition to this statutory remedy, more than a century of judicial interpretation allows courts to dismiss a chapter 11 case for "lack of good faith." 7 *Collier* ¶ 1112.07; *see also, e.g., Dunes Hotel Assocs. v. Hyatt Corp.*, 245 B.R. 492, 511-12 (D.S.C. 2000) (affirming dismissal where solvent debtor filed case to avoid unfavorable lease terms). Nor will bankruptcy courts allow the use of chapter 11 to "frustrate the rights of creditors (particularly with respect to single asset cases)." 7 *Collier* ¶ 1112.07[2]; *see also In re Bowman*, 181 B.R. 836, 846 (Bankr. D. Md. 1995) (dismissal when "the debtor files for the purpose to 'hold a single asset hostage in order to speculate that such asset may increase in value in order to recover its original value at the creditor's risk'" (citation omitted)). The sort of gamesmanship and abuse of chapter 11 that the FCC seems to fear would likely find a cold reception in bankruptcy court.

[39] *See Airadigm Communications, Inc.*, Petition for Reinstatement, DA 00-68 at 5 (filed Feb. 7, 2000).

Moreover, the specter of bankruptcy itself is likely to dissuade disingenuous bidding. Even in the best of circumstances, chapter 11 is not a particularly attractive process. The absolute priority rule puts equity at substantial risk of recovering nothing until debt is repaid in full. Quite often the equity is completely wiped out. Additionally, in most situations, such as Airadigm's, senior management is replaced. The debtor may lose control over its own business affairs. There is no reason to believe that any individual or entity would deliberately set out on a course that it believed likely to end in bankruptcy, or that any outside investor would provide money to fund such a venture.

In addition, the FCC's rules provide other strong disincentives against default. Defaulting bidders are barred from participation in auctions, 47 C.F.R. § 1.2105(a)(2)(x), and any affiliate of any entity that has ever been in default must pay a substantial premium to participate in future auctions, 47 C.F.R. § 1.2106(a). The severity of these penalties cannot be underestimated, as carriers are constantly looking for additional spectrum, and typically participate in each successive auction. Likewise, defaulting bidders may be subject to substantial financial penalties. *See* 47 C.F.R. § 1.2109.

Finally, instead of becoming a creditor, the FCC could have structured its payment obligations differently, to avoid conflict with the Bankruptcy Code. The FCC auctioned ten-year licenses and financed 90 percent of the purchase price with ten-year notes requiring periodic payments. The Commission instead might have auctioned off one-year licenses, automatically renewable for up to nine further one-year terms upon receipt of specified payments.[40] The difference between pre-petition debt and current payment

[40] Because of this important distinction, there is little basis to fear the slippery slope predicted by the government—that the D.C. Circuit's decision would subject to "revision and renegotiation in bankruptcy" even a state drivers' license fee. FCC Br. 28 n.9.

obligations carries profound significance in bankruptcy. If the FCC failed to heed the Bankruptcy Code when structuring its payment options, it cannot now hide behind the Communications Act to escape the consequences of that failure.

Nowhere has the FCC explained why its existing rules, or those of the Bankruptcy Code, are inadequate to prevent the "insincere bidding" that it so fears (and so vaguely defines). The D.C. Circuit's opinion points out some further alternatives: credit checks, third party guarantees, or other schemes. *See NextWave Personal Communications, Inc. v. FCC*, 254 F.3d 130, 155 (D.C. Cir. 2001).[41] The notion that automatic cancellation is necessary to the efficient functioning of FCC auctions is baseless.

III. IN ANY EVENT, THE FCC SHOULD RETAIN AUTHORITY TO WAIVE ITS CANCELLATION RULE OR REINSTATE LICENSES

The FCC has discretion to waive any of its rules. 47 C.F.R. § 1.925. Such fact-specific waivers are necessary to proper application of the substantive and procedural mandates of the Communications Act, 47 U.S.C. § 309, and the Administrative Procedure Act, 5 U.S.C. § 706. "The agency's discretion to proceed in difficult areas though general rules is intimately linked to the existence of a safety valve procedure for consideration of an application for exemption based on special circumstances." *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969). While the FCC may establish rules of general application, it retains "an obligation to seek out the 'public interest' in particular, individualized cases." *Id.*

The government's brief is somewhat troubling in this regard, to the extent it suggests that automatic cancellation for untimely payment in bankruptcy is directly mandated by the Communications Act. *See, e.g.*, FCC Br. 20 (suggesting

[41] There is no support for the government's assertion, FCC Br. 50, that these would necessarily entail subjective inquiries.

that cancellation for "failure to make timely payment" is part of "the auction regime Congress established in Section 309(j)"); *see also* ASRC Br. 39. As demonstrated above, that suggestion is simply incorrect: the automatic cancellation policy is an FCC interpretation of its own regulation, not a command of the statute. Because automatic cancellation is not required by the Communications Act, such cancellation can be waived. The FCC has itself recognized this by waiving its down payment rules[42] and its installment payment rules[43] when it has concluded that doing so was in the public interest.

There is little question that waiver in the cited cases, and in Airadigm's case here, is in the public interest. If Airadigm is forced to cease operations, more than 30,000 Americans will lose their wireless service; many small businesses and institutions will lose their primary phone service; millions of dollars of consumer and business investment will be lost; the marketplace will lose a competitor; employees will be put out of work; and a tribe of Native Americans will lose service to their reservation, and also the value of their multi-million dollar investment. Thus, even were this Court persuaded that the FCC has the power to cancel PCS licenses for a bankrupt licensee's untimely payment of quarterly interest, it should take care not to constrain the FCC's discretion to waive that policy under appropriate circumstances.

[42] *See AMK Int'l, Inc.*, 12 F.C.C.R. 1511 (WTB 1997); *Cenkan Towers, L.L.C.*, 12 F.C.C.R. 1516 (WTB 1997); *Hickory Tel. Co.*, 12 F.C.C.R. 1528 (WTB 1997); *The Wireless, Inc.*, 12 F.C.C.R. 1821 (WTB 1997); *Roberts-Roberts & Assocs., L.L.C.*, 12 F.C.C.R. 1825 (WTB 1997); *RFW, Inc.*, 12 F.C.C.R. 1536 (WTB 1997); *MFRI, Inc.*, 12 F.C.C.R. 1540 (WTB 1997); *CSS Communications, Co.*, 12 F.C.C.R. 1507 (WTB 1997); *Longstreet Communications Int'l, Inc.*, 12 F.C.C.R. 1549 (WTB 1997).

[43] *See Lakeland PCS LLC*, Second Order on Reconsideration, 15 F.C.C.R. 23733 (WTB 2000).

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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